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NO. 88-789

IN THE
# SUPREME COURT OF THE UNITED STATES
October Term, 1988

RAILROAD COMMISSION OF TEXAS, *et al.*,
*Petitioners,*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENTS MISSOURI PACIFIC RAILROAD COMPANY, *et al.* IN OPPOSITION

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Date: November 23, 1988

## QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act.

2. Whether, under the Federal Railroad Safety Act and its attendant regulations, 16 T.A.C. §5.622 is impliedly preempted.

Respondents do not ignore petitioners' first Question Presented, but for reasons explained at page 12 herein believe only those two questions listed above are pertinent.

## LIST OF PARTIES

**Petitioners:**

Railroad Commission of Texas

Its Members: James E. Nugent
Kent Hance
John Sharp

**Respondents:**

Missouri Pacific Railroad Company

Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. Other subsidiaries of Union Pacific Corporation are Union Pacific Railroad Company, Union Pacific Resources Company and Union Pacific Realty Company.

Southern Pacific Transportation Company

Southern Pacific Transportation Company is owned by S.P.T.C. Holding, Inc., a wholly owned subsidiary of Rio Grande Industries, Inc.

St. Louis Southwestern Railway Company is controlled by Southern Pacific Transportation Company.

The Atchison, Topeka and Santa Fe Railway Company

The Atchison, Topeka and Santa Fe Railway Company is a subsidiary of Santa Fe Industries, Inc. Santa Fe Industries, Inc. is a subsidiary of Santa Fe Southern Pacific Corporation. Publicly-traded affiliates of The Atchison, Topeka and Santa Fe Railway Company are Santa Fe Natural Resources, Inc. and Santa Fe Energy Partners, L.P.

Burlington Northern Railroad Company

Burlington Northern Railroad Company is a subsidiary of Burlington Northern Inc.

Missouri-Kansas-Texas Railroad Company

Missouri-Kansas-Texas Railroad Company is a subsidiary of Missouri Pacific Railroad Company.

Kansas City Southern Railway Company

Kansas City Southern Railway Company is a subsidiary of Kansas City Southern Industries, Inc. Louisiana and Arkansas Railway Company is a subsidiary of Kansas City Southern Railway Company. Kansas City Southern Industries, Inc. owns a majority interest in DST Systems, Inc.

Louisiana and Arkansas Railway Company

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## STATEMENT OF THE CASE

By June 16, 1986 action, the Railroad Commission of Texas and its members (hereinafter "Commission" or "petitioners") adopted 16 T.A.C. §5.622, a rail regulation in its original form proposed by the United Transportation Union which mandates use of cabooses on most trains in Texas unless certain train and track equipment is utilized and which also requires a caboose escort for the transportation of certain hazardous materials. By Complaint filed in the United States District Court for the Western District of Texas, Austin Division, on October 17, 1986, the railroads noted by three distinct causes of action that the Commission rule was preempted by different federal laws and their attendant regulations, by a fourth cause of action that the Commission rule created an unconstitutional burden on interstate commerce, by a fifth cause of action that the Commission rule created an unconstitutional impairment of contract rights, by a sixth cause of action that the Commission rule was an unlawful exercise of power by the petitioners and by a seventh cause of action that the Commission action was arbitrary, capricious and unsupported by substantial evidence. The railroads moved for a Preliminary Injunction on the basis of the first three causes of action entailing various preemption grounds under differing federal laws and regulations. The Commission moved to consolidate the Preliminary Injunction hearing with a trial on the merits, which was done. The trial court entered its final judgment on the basis of all three causes concerning preemption by various federal statutes and their attendant regulations, without reaching the remaining four causes of action. The United States Court of Appeals for the Fifth Circuit affirmed the trial court on the basis only of one of the causes of action regarding preemption, specifically, that the Commission rule was federally preempted by the Federal Railroad Safety Act and its attendant regulations. The two remaining preemption grounds of the district court decision were not reached by the appellate court, as necessarily were not the four non-preemption causes of action alleged in the Original Complaint.

## SUMMARY OF ARGUMENT

The Commission's assertions notwithstanding, there is no reason to grant Writ of Certiorari in this case. The Fifth Circuit decision is not in conflict with any decision of a federal court on the same matter. The decision is not a departure from the accepted and usual course of judicial proceedings, but rather is simply another affirmation of the preemptive nature of a pervasive, federal regulatory scheme. No reason exists to suspect that federal regulatory control of rail safety, one of the most extensive federal regulatory regimes existent, in some way is immune from the federal common law of implied preemption. It is clear that the Federal Railroad Administration has addressed the caboose issue by saying that it is not even a safety matter *per se*, hence a subject matter over which the Federal Railroad Administration chooses not to extend its regulatory jurisdiction, and that the caboose issue is adequately addressed by the collective bargaining process.

## ARGUMENT

1. Whether the Fifth Circuit erred in holding that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act.

Petitioners suggest that because the Federal Railroad Safety Act has an express preemption provision, somehow the federal common law of implied preemption is inapplicable. Petitioners cite no cases to this effect. Not only did the Fifth Circuit opinion adequately address petitioners' concern by a proper analysis of the pertinent federal authorities and the legislative history of the Federal Railroad Safety Act, but a long line of consistent federal case law authority stands for the proposition that implied preemption of state regulatory activity is appropriate when the regulatory subject matter is one of dominant federal concern, when there exists a pervasive federal regulatory regime or when the state regulation stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

To begin, the Fifth Circuit (850 F.2d at 266, Petitioners' Appendix at 4a) analyzed the preemptive provision of the Federal

Railroad Safety Act to determine Congressional intent in light of the Act's legislative history, the attendant federal rail safety regulations and the eighteen year history of federal regulatory control over the railroad industry pursuant to the Act. Since its enactment, a feature of the Federal Railroad Safety Act has been that the regulations relating to railroad safety shall be nationally uniform to the extent practicable. A state may adopt or continue in force a law, rule, regulation, order or standard covering a rail safety matter which the Secretary of Transportation has addressed only: (1) when necessary to eliminate or reduce an essentially local safety hazard; (2) when not incompatible with any federal provision; and (3) when not creating an undue burden on interstate commerce. All three prongs must be satisfied. Congressional intent to preempt most state regulation except under very narrow circumstances is made crystal clear in the Congressional deliberations prior to the enactment of the Federal Railroad Safety Act.

The House Report accompanying the draft bill articulates the intent to establish uniform national standards:

> With the exceptions of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system....the integral operating parts of these companies cross many State lines. In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communication systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.
>
> 1970 U. S. Code Cong. and Admin. News, 91st Cong. 2nd Sess. 4104, 4110-11.

In the House of Representatives' discussion before the House vote on the Federal Railroad Safety Act, Representative Jake Pickle explained Congress' intent to narrowly limit state action:

> Perhaps the most beneficial aspect of this legislation is that, unlike the Senate version, this bill precludes the possibility of 50 different sets of safety regulations for 50 different states. We take away the potential for patchwork and jig-saw puzzles in the area of railroad safety.
>
> 116 Cong. Rec. 27613 (August 6, 1970).

The very text of the bill itself, together with those legislative history excerpts presented, evince the Congressional intent that the Federal Railroad Safety Act and regulations promulgated thereunder supersede the exercise of state authority except in very narrow circumstances. When Congress has manifested its intent clearly, there is no presumption against preemption of state safety regulations. *See, e.g., National Association of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 13 (3d Cir. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 671 (9th Cir. 1972), *aff'd*, 411 U.S. 624 (1973).

When courts have been faced with the task of discerning the Congressional intent of 45 U.S.C. §434 *vis-a-vis* preemption, they have read it to provide a narrow exception to federal preemption of state regulation. In *Atchison, Topeka and Santa Fe Railway Co. v. Illinois Commerce Commission*, 453 F.Supp. 920 (N.D. Ill. 1977) (hereafter *ATS&F v. ICC*), the Court considered a state order which required special handling of 130 commodities in addition to those commodities federal regulations already required to be specially handled. In addressing the preemption standard of 45 U.S.C. §434, the Court held that the standard ought be read to broadly preempt state regulation:

> Although the court has found no reported decision which addresses the precise problems raised by this case, those which have dealt with the Railroad Safety Act are uniform in their finding of Congressional intent to preempt most state regula-

> tion relating to railroad safety. Commenting on §434, which is quoted above, the Third Circuit said, "We believe these statutory provisions evince, as the district court determined, 'a total preemptive intent.'" Similarly, the Fifth Circuit has noted, "The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety..."
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> *ATS&F v. ICC* at 925 (quoting *National Association of Regulatory Utility Commissioners v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) and *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) (emphasis added).

The Fifth Circuit, in a case in which this Court denied a petition for certiorari, had already assessed Congressional intent regarding preemption of state regulation of rail safety matters. In *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973), the Fifth Circuit considered a Louisiana parish's attempt to regulate allegedly dangerous conditions of railroad tracks, roadbeds and other facilities. The Fifth Circuit held:

> The meaning of the Congressional declaration is clear. The ultimate goal of the Act is to establish nationally uniform control of railroad safety, but the statute is not ironclad. The Act specifically authorizes a *narrow spectrum* of deviation from national uniformity, and the issue here is whether appellants' state court suit falls within one of the permissible exceptions.
>
> *Id.* at 1112 (emphasis added).

For the purposes of general preemption analysis, it is clear that the Fifth Circuit had already ruled that only a narrow exception exists to federal preemption in rail safety matters. In short, 45 U.S.C. §434 generally only allows a narrow exception to fed-

eral control of railroad safety matters, preempting most state regulation.

Against this backdrop of the Federal Railroad Safety Act's legislative history and judicial treatment, the Fifth Circuit in this case addressed the Commission's concern that, since the language of the Federal Railroad Safety Act provided some role for state regulation, implied preemption was inappropriate. At least since the *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) decision (hereinafter *Ray*), the federal common law of implied preemption has been clear. As stated in *Ray* and noted by the Fifth Circuit in the underlying decision in this case, one of the legitimate questions in a preemption inquiry is whether Congress has either explicitly or implicitly declared that the states are prohibited from regulating a given area. As stated in the *Ray* decision, quoting from numerous United States Supreme Court precedents, Congressional preemptive purpose may be evidenced by a federal regulatory scheme so pervasive as to make reasonable the inference that Congress left no room for states to supplement the regulatory area, or the act of Congress may concern a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws, or the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the federal dominance in the field. Even if Congress has not completely foreclosed state legislation of a particular area, state regulation is void to the extent it conflicts with federal regulatory control. A conflict will be found where compliance with both is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

All of the above statements are lifted directly from the *Ray* decision (435 U.S. at 157-158), wherein United States Supreme Court precedent is given for each statement. In short, there is a common law of implied preemption which may exist in conjunction with an express preemption provision in a statute. As is clear from the extent of the federal dominance over the railroad industry and the very nature of rail transportation as inherently interstate, and as made clear in case law cited earlier discussing Congressional intent in the enactment of the Federal Railroad Safety Act

and the legislative history of the statute itself in those excerpts provided, there is nothing logically inconsistent with the notion of implied preemption in connection with the Federal Railroad Safety Act. Indeed, the *Ray* case, which unambiguously defines the notion of implied preemption, itself concerned a federal law containing an express preemption provision. No subsequent case considering the *Ray* decision has altered the federal common law that creates implied preemption of state regulatory activity under certain circumstances[1]; certainly the petitioners have failed to cite any decision even suggesting that rail safety regulation, a matter inherently federal in nature, is exempt from federal common law.

2. Whether, under the Federal Railroad Safety Act and its attendant regulations, 16 T.A.C. §5.622 is impliedly preempted.

Given that implied preemption of a state regulatory agency rule is permissible under the Federal Railroad Safety Act, the question becomes whether 16 T.A.C. §5.622 is preempted by Federal Railroad Administration action – in terms of the statute, has the Federal Railroad Administration covered the subject matter of cabooses. The Fifth Circuit had occasion to discuss the meaning of this statutory language in recent litigation between these parties. *See, Missouri Pacific Railroad Co., et al. v. Railroad Commission of Texas,* 833 F.2d 570 (5th Cir. 1988). While the Fifth Circuit in this earlier decision was concerned with a different Commission rule, the analysis of implied preemption is both apt and consistent with *Ray*, and was utilized by the Fifth Circuit in the instant case.

The Fifth Circuit held that "covering the subject matter" has a practical as well as a policy dimension under the Federal Railroad Safety Act. The Fifth Circuit analyzed the *Ray* principle

[1] For example, the Commission cites the 1986 decision *Louisiana Public Service Commission v. Federal Communications Commission,* 476 U.S. 355 (1986) for the argument that implied preemption is improper. Yet the text of this case directly confirms the notion that state regulation will generally be displaced to the extent that it stands as an obstacle to the accomplishment of Congressional intent, *id.* at 368-69. The Congressional intent with the Communications Act of 1934, however, was to leave to the exclusive control of states all intrastate wire and radio communication, i.e., the statute contained an express prohibition against federal preemption of the pertinent subject matter, quite differently than in the instant case.

that where failure of federal officials to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, states are not permitted to use their police power to enact such regulation. It rephrased the federal test as: If the policy maker has looked at the matter and decided that it is appropriate to do nothing, then there is an implied preemption against the state enacting such regulations. This is much the same test stated in *Ray* as whether the Secretary "has addressed" the subject matter of the challenged regulation.

The Federal Railroad Administration, in the context of a rulemaking procedure, has already considered whether train operation safety requires a caboose. The Federal Railroad Administration failed to adopt such a requirement, expressly stating that the caboose is not even a safety issue.

As outlined above, Congress, in enacting the provisions found at 45 U.S.C. §434, intended to preempt the field of rail safety standards, permitting state regulation in such areas only within the narrowly expressed exceptions to such preemption. By Commission argument, the adopted rule was designed as a railroad safety measure requiring utilization of cabooses, by its terms applicable to essentially all freight trains operated within the state of Texas. It has therefore been preempted by federal railroad safety standards if the Secretary of the Department of Transportation, or his designee, the Administrator of the Federal Railroad Administration, has adopted a standard "covering the subject matter" of the occupied caboose law within the meaning of 45 U.S.C. §434.

There is no federal statute or regulation which affirmatively requires that the last car of a freight train be an occupied caboose. However, there are regulations adopted by the Administrator of the Federal Railroad Administration which contemplate and facilitate the operation of freight trains without occupied cabooses.

Effective June 15, 1986, the Administrator of the Federal Railroad Administration, Department of Transportation, amended regulations found at 49 C.F.R. part 232 relating to railroad power brakes and draw bars. *See*, 51 Fed. Reg. 17300 *et seq*. Effective August 11, 1986, the Administrator amended regulations found at 49 C.F.R. parts 218 and 221 regarding rear-end marking devices

on passenger, commuter and freight trains. *See,* 51 Fed. Reg. 25180 *et seq.* Both amendments were promulgated to accommodate and facilitate the operation of freight trains without cabooses. In taking these actions in the summer of 1986, the Federal Railroad Administration has "covered the subject matter" of the subject state rule within the meaning of 45 U.S.C. §434, and has therefore preempted any state law requiring the use of occupied cabooses on a statewide basis. Under the Supremacy Clause and the express provisions of the Federal Railroad Safety Act, the Commission's occupied caboose rule is unenforceable as a matter of law.

Public hearings on these two sets of regulations were held during the last week of October 1985. *See,* 51 Fed. Reg. at 17300 and at 25180. As was noted in the background explanation set forth at 51 Fed. Reg. 17300-17301:

> Rail labor organizations and individual railroad employees generally opposed the rule [amending the power brake requirements]. The thrust of their objections...dealt with the presence or absence of a caboose at the end of a train...The major objection raised by commentators opposed to the proposed rule was the opinion that the elimination of a caboose from the end of a train adversely affects safety. For example, the comments of the Railway Labor Executives' Association and the United Transportation Union called for new requirements, e.g., overheated bearing/wheel detectors, train length restrictions, and dragging equipment detectors, to counteract the perceived safety detriment of cabooseless trains. FRA does not agree with this line of analysis. First, nothing in any current FRA regulation requires a caboose on any train, nor does anything in the final rule issued in this docket authorize the removal of a caboose. The determination on whether a railroad uses a caboose on any given line is made through the collective bargaining process. Moreover, the FRA does not consider the lack of a caboose to be a

> safety issue per se. While this final rule may facilitate railroads' obtaining economic benefits from cabooseless operations, it does not in any way determine whether a caboose will or will not be used.

As evident from the excerpt, the Federal Railroad Administration considered comments from various groups including the United Transportation Union (the proponent of the original Texas caboose rule) suggesting use of various track/train equipment with cabooseless operations (essentially the Texas caboose rule). The Federal Railroad Administration expressly rejected those comments by stating that not only was the caboose issue one over which it affirmatively chose to not exercise its safety jurisdiction, but also that the issue was adequately addressed by collective bargaining processes. In amending the power brake rules to facilitate cabooseless operations, the Federal Railroad Administration explicitly set forth its standard of not expressly adopting any caboose requirement.

The determination of the Federal Railroad Administration that it would not "require a caboose on any train, nor...authorize the removal of a caboose" but rather would leave the issue to the collective bargaining process must be viewed in light of its statutory mandate to "prescribe, as necessary, appropriate values...and standards for all areas of railroad safety." 49 C.F.R. 1.49(n); 49 C.F.R. §209.1. The federal agency had previously announced its intent to retain and to exercise exclusive jurisdiction to regulate the safety of railroad operations. 43 Fed. Reg. 10583, 10585. The agency delineated its activities as follows:

> The overall FRA program to assure the safety of railroad operations may be generally subdivided into three fields: (1) Track, roadbed, and associated devices and structures, (2) equipment, and (3) human factors. FRA has now exercised its statutory authority with respect to each of these regulatory fields by actual rulemaking. While it is expected that additional regulatory initiatives may be undertaken, as necessary, in each of the major

> regulatory fields, it is the judgment of the agency that piecemeal regulation of individual hazards in any of the three regulatory fields by any other agency of government would be disruptive and contrary to the public interest.
>
> 43 Fed. Reg. at 10586.

The Federal Railroad Administration concluded that it "does not consider the lack of a caboose to be a safety issue *per se*," and therefore elected not to utilize its safety regulatory authority to address cabooses.[2] Under well-established principles of federal preemption, a federal decision **not** to regulate has the same preemptive effect as a decision to regulate. The Supreme Court articulated this principle in *Arkansas Electric Co-Op. Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983):

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left **un**regulated, and in that event would have as much preemptive force as a decision to regulate.
>
> (Emphasis in original.)

When the Federal Railroad Administration concluded in 1986 that it would not require the use of cabooses on freight trains, it affirmatively decided that the "caboose issue" was not within the ambit of safety regulations that the Federal Railroad Administration would adopt. The Federal Railroad Administration made these decisions in its adoption of regulations which facilitate cabooseless operations. It would frustrate Congressional intent and be abortive of existing federal regulations to allow a state to mandate cabooses while the Federal Railroad Administration is assisting in the expansion of cabooseless operations.

[2] Petitioners appear to concede at pages 8-9 of their Petition that the state rule was adopted because of their difference of opinion with the Federal Railroad Administration about whether the caboose issue is a safety matter.

Commission's "Private Agreement" Issue
(Germane to Commission's First 'Question Presented')

The Commission makes much ado about nothing in its argument that the Fifth Circuit decision in some way sets the dangerous precedent that private agreements may override governmental regulation of a rail safety issue. The railroads note emphatically that no such issue was ever present in this case at any level; it is stressed now by the Commission only to making enticing the Petition.

The only issue decided by the Fifth Circuit was whether 16 T.A.C. §5.622 was impliedly preempted by the Federal Railroad Administration having addressed the subject matter. Discussion of collective bargaining processes[3] arose only because when the Federal Railroad Administration affirmatively chose not to exercise its regulatory authority over the caboose issue, it noted incidentally that the matter was not a safety issue anyway but rather a collective bargaining issue.

The Commission cites *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), as supportive of two additional propositions – that a state may require cabooses by its police power and that a caboose requirement is not unduly burdensome. Concerning the first proposition, the Fifth Circuit adequately distinguished this 1943 decision by noting that it was decided twenty-seven years prior to enactment of the Federal Railroad Safety Act, the preemptive effect of which is at issue, and that safety considerations are far different now. The second proposition is concededly not at issue (*Petition* at 16).

[3] Wherein incidentally both in 1982 and 1985 the United Transportation Union agreed with railroad management to expanded cabooseless operations nationwide.

## CONCLUSION

Implied preemption of state regulatory action is appropriate when the state action conflicts with federal superintendence of the regulatory field by standing as an obstacle to the accomplishment and execution of the full purposes and objective of Congress or by frustrating federal regulations controlling the field. With the Federal Railroad Safety Act, an almost total preemptive intent has been expressed through the Act, its legislative history, its court interpretations and the eighteen year span of its regulatory regime. Essentially, states may regulate local safety hazards, i.e., particular, localized conditions not caught by the federal net. Regarding the caboose issue, the Federal Railroad Administration has adopted safety regulations specifically designed to facilitate cabooseless operations. While so doing, the Federal Railroad Administration affirmatively asserted, after considering the safety arguments for and against caboose use, that it would forego express regulation thereover, i.e., that the area is best left unregulated by rail safety administrators and left to the collective bargaining processes.

Respectfully submitted,

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